IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

APPEAL FROM ORDER No. 467 of 2007
With
CIVIL APPLICATION No. 15737 of 2007
In APPEAL FROM ORDER No. 467 of 2007

For Approval and Signature:

HONOURABLE MR.JUSTICE DN PATEL

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1 Whether Reporters of Local Papers may be allowed to see the judgment ?

2 To be referred to the Reporter or not ?

3 Whether their Lordships wish to see the fair copy of the judgment ?

4 Whether this case involves a substantial question of law as to the interpretation of the constitution of India, 1950 or any order made thereunder ?

5 Whether it is to be circulated to the civil judge ?

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PERCEPT PICTURE COMPANY PVT. LTD. - Appellant(s)
Versus
SHREE KARMA PRODUCTION PVT. LTD. & 1 - Respondent(s)

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Appearance :
Mr.N.D. Nanavati, Senior Counsel with Mr.Y.J. Trivedi with Ms.Khooshnum R. Daviervala for Mulla & Mulla with Mr.Harshit Tolia with Mr.Jatin Y. Trivedi with Mr.Tejas Trivedi for the appellant.

Mr.Kamal Trivedi, Senior Counsel with Mr.A.R. Majmudar for Respondent No.1.

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CORAM : HONOURABLE MR.JUSTICE DN PATEL

Date : 28/12/2007

ORAL JUDGMENT

Rule. Learned counsel Mr.A.R. Majmudar waives service of notice of Rule on behalf of respondent No.1.

2. This Appeal from Order has been preferred against the order dated 24th December,2007 passed by learned In-charge District Judge, Vadodara below Exh-5 application in Regular Civil Suit No.44 of 2007, whereby without giving notice to defendants, ex-parte, ad-interim relief, has been granted in favour of the plaintiff, in terms of para 29(a) and 29(b) of injunction application-Exh-5 application, preferred in the Suit. These prayers which are granted by ex-parte order, read as under:

> *"29(a) pending hearing and final disposal of this suit, the Defendants by themselves, their directors, servants, agents and distributors/exhibitors be restrained by an order of this Hon'ble Court from infringing the Plaintiffs' copyright in the artistic work "Bal Hanuman" registering under No. A-57127/99, in any manner whatsoever and by reproducing the same or substantial part thereof in any material form or by incorporating the Plaintiffs' said artistic work or any substantial part thereof or any reproduction thereof in a cinematograph film or by communicating the Plaintiffs' artistic work or any substantial part thereof or a reproduction thereof to the public or by exhibiting, distributing, broadcasting, publishing, screening or communicating the cinematograph film titled "Hanuman Returns" or "Return of Hanuman" or in any other manner whatsoever;*
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> *(b) pending hearing and disposal of this suit, the Defendants by themselves, their directors, servants, agents and distributors/exhibitors be restrained by an order of injunction of this Hon'ble Court*

> *from using the character "Bal Hanuman" shown in **Annexure 'A'** to the plaint or any other character visually similar thereto in cinematograph film or any advertisement of the said cinematograph film or from exhibiting, distributing, broadcasting, publishing or communicating the said cinematograph film so as to pass off or enable others to pass off the said cinematograph film or advertisement thereof as the cinematograph film having the Plaintiffs' character of "Bal Hanuman" or in any other manner whatsoever."*

Against grant of these prayers, original defendant No.1 has preferred this Appeal from Order.

3. Having heard the learned counsel for both the sides and looking to the facts and circumstances of the case, the order dated 24th December,2007 passed by learned In-charge District Judge, Vadodara below Exh-5 application in Regular Civil Suit No.44 of 2007 deserves to be quashed and set aside, mainly for the following facts and reasons:

(i) It appears from the facts of the case that the present appellant is original defendant No.1, against whom, the respondent No.1 (original plaintiff) has instituted Regular Civil Suit No.44 of 2007 mainly for infringement of copyright. A copyright claimed by present respondent No.1 (original plaintiff) is upon artistic work "Bal Hanuman", which is presented at Mark 4/3 and 4/4, in the Suit, whereas the present appellant (original defendant No.1) has already released a film "Return Of Hanuman", which is a fiction film and as per original

plaintiff, there is a breach of infringement of the copyright. Film namely “Return Of Hanuman” was going to be released on 28th December,2007 and the suit was instituted on 24th December,2007 i.e. 4 days prior to the date of release of the film and without issuance of Notice to the appellant (defendant No.1), ex-parte ad-interim relief has been granted by the Trial Court.

(ii) It appears from the facts of the case that the original defendants have started giving their advertisement in local daily newspaper from 15th August,2007. Learned counsel for the appellant (original defendant No.1) has pointed out that on 15th August,2007, in local daily newspapers an advertisement was given that the film is going to be released in the month of November,2007. Widely, openly, extensively and publicly the advertisements were given frequently, from August,2007 but no suit was ever instituted by the original plaintiff. Learned counsel for the appellant (defendant No.1) submitted that even in the month of September,2007, an advertisement was given in local daily newspaper that the film is going to be released soon, but, the Suit was instituted on 24th December,2007. Thus, it appears, prima facie, that -

(a) Initially, advertisements were as to “Hanuman Returns” and later on, advertisements are as to “Return of Hanuman”. This was published,

in news papers, at least from 15th August,2007 onwards widely, openly, extensively and publicly that defendants are making the film.

(b) Learned counsel for the appellant (original defendant No.1) submitted that distributors and sub-distributors have been appointed by entering into separate contract and cinema halls have been booked, in the whole country and the film was going to be released on 28th December,2007 i.e. today.

(c) Thus, prima facie plaintiff had knowledge of making of the film by the defendants. Plaintiff waited enough. Only 4 days prior to release of the film, suit is instituted.

Thus, if notice would have been issued by the trial court, defendants could have brought to the notice of the trial court all these facts and the matter could have been decided, prior to release of the film.

(iii) It appears from the facts of the case that the original plaintiff has not made any film on the basis of artistic work of “Bal Hanuman” but licence was given initially, as per submissions of both the counsels to Silver Lines (now known as Silver Line Technologies Limited”) and film namely “Bal Hanuman” was released in the year 2005. Learned counsel for the appellant

(original defendant no.1) submitted that if notice would have been issued by the trial court, all these facts could have been brought to the notice of the trial court. The plaintiff can be compensated in terms of money like earlier agreement.

(iv) Looking to the facts of the case, it appears that there is no satisfaction arrived at by the trial court, as required under proviso of Rule 3 of Order XXXIX of the Code of Civil Procedure,1908, that object of granting the injunction would be defeated by delay. This satisfaction ought to have been arrived at by the Trial Court, before granting ex-parte interim relief in favour of the original plaintiff. Looking to the impugned order, only satisfaction arrived at for grant of ex-parte interim relief, reads as under:

> “I have gone through the record, I find prima facie good case in favour of the applicant and if any exparte order is not made the valuable right of the applicant will be under attack.”

Looking to these reasonings, no satisfaction has been arrived at by the trial court that object of grant of injunction would be defeated by delay, which is sine qua non, for operating an exception i.e. proviso of Rule 3 of Order XXXIX of the Code of Civil Procedure,1908. The only reason assigned by the trial court for grant of ex-parte order is “the valuable right of the applicant will

be under attack." How and why this right is under attack is not reflected in the order. For grant of ex-parte interim relief "no notice" and "no reasons" cannot go together. It should be kept in mind by those, who are engaged, in justice delivery system, that as far as possible, as a matter of rule, before passing any adverse order against anyone, at least, an opportunity of being heard ought to be given. Sometimes it is difficult to give an opportunity of being heard before passing adverse order. In these circumstances also, a judge must make all endevour or attempts to make it possible, to give an opportunity of being heard. This is an art, with which, the judges are wedded with and if a judge is of the opinion that object of grant of injunction would be defeated by delay, than only, by recording reasons therefore, an exception can be followed as referred in proviso of Rule 3 of Order XXXIX of the Code of Civil Procedure. In facts of the present case, notice could have issued and could have been made returnable in a day or two. As the whole suit as well as stay application, is pending before the Trial Court, this Court is not much analyzing the facts, in detail. Learned counsel for both the sides have argued the matter in detail, but this Court is not discussing about the merits and demerits of Exh-5 application. Suffice it to say at this stage, that the trial court ought to have issued Notice and made it returnable in a day or two, i.e. prior to date of release

of the film. It has been held by Hon'ble Supreme Court in the case of **Shiv Kumar Chadha V/s. Municipal Corporation of Delhi and others reported in (1993)3 SCC 161,** especially para 32 and 33, read as under:

> *"32. Power to grant junction is an extraordinary power vested in the Court to be exercised taking into consideration the facts and circumstances of a particular case. The Courts have to be more cautious when the said power is being exercised without notice or hearing the party who is to be affected by the order so passed. That is why Rule 3 of Order 39 of the Code requires that in all cases the Court shall, before grant of an injunction, direct notice of the application to be given to the opposite party, except where it appears that object of granting injunction itself would be defeated by delay. By the Civil Procedure Code (Amendment) Act,1976, a proviso has been added to the said rule saying that "where it is proposed to grant an injunction without giving notice of the application to the opposite-party, the Court shall record the reasons for its opinion that the object of granting the injunction would be defeated by delay..."*
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> *33. It has come to our notice that in spite of the aforesaid statutory requirement, the Courts have been passing orders of injunction before issuance of notices or hearing the parties against whom such orders are to operate without recording the reasons for passing such orders. It is said that if the reasons for grant of injunction are mentioned, a grievance can be made by the other side that Court has prejudged the issues involved in the suit. According to us, this is a misconception about the nature and the scope of interim orders. It need not be pointed out that any opinion expressed in connection with an interlocutory application has no bearing and shall not affect any party, at the stage of the final adjudication. Apart from that now in view of the proviso to Rule 3 aforesaid,*

there is no scope for any argument. When the statute itself requires reasons to be recorded, the Court cannot ignore that requirement by saying that if reasons are recorded, it may amount to expressing an opinion in favour of the plaintiff before hearing the defendant."

(Emphasis supplied)

Likewise, it has been held by Hon'ble Supreme Court in the case of **Morgan Stanley Mutual Fund V/s. Kartick Das reported in (1994)4 SCC 225,** especially in para 36, reads as under:

"36. As a principle, ex parte injunction could be granted only under exceptional circumstances. The factors which should weigh with the court in the grant of ex parte injunction are -

(a) whether irreparable or serious mischief will ensue to the plaintiff;
(b) whether the refusal of ex parte injunction would involve greater injustice than the grant of it would involve;
(c) the court will also consider the time at which the plaintiff first had notice of the act complained so that the making of improper order against a party in his absence is prevented;
(d) the court will consider whether the plaintiff had acquiesced for sometime and in such circumstances it will not grant ex parte injunction;
(e) the court would expect a party applying for ex parte injunction to show utmost good faith in making the application.
(f) even if granted, the ex parte injunction would be for a limited period of time.
(g) General principles like prima facie case, balance of convenience and irreparable loss would also be considered by the Court."

(Emphasis supplied)

In view of these judicial pronouncements, satisfaction must have been arrived at by the trial court that the object of grant of injunction would be defeated

by delay. There is no such satisfaction in the impugned order. It submitted by learned counsel for appellant (original defendant No.1) that had there been a notice, the following vital facts could have been brought to the notice of the trial Court:

(a) advertisements from August,2007 onwards;
(b) earlier agreement;
(c) expenditure of approximately Rs.15 Crores;
(d) by now, already agreements have been entered into for appointment of distributors, sub-distributors, booking of cinema halls, all over the country;
(e) readiness, by defendants to maintain accounts of income and expenditure due to release of the film;
(g) imagination about picture of “Shri Hanumanji” is more or less similar, in mind-set of people of this country. Therefore if any two or more persons, of this country, draws, a picture of “Shri Hanumanji”, several features will be common.

4. In view of the aforesaid facts, reasons and judicial pronouncements, the order dated 24th December,2007 passed by learned In-charge District Judge, Vadodara below Exh-5 application in Regular Civil Suit No.44 of 2007 is hereby quashed and set aside. The original defendants are hereby directed to maintain accounts of income and expenditure of the film “Return of Hanuman” and shall be presented before the Trial Court, if it is so ordered. Learned counsel for the original

plaintiff has submitted in detail about breach of ex-parte interim relief and also pointed out that there is territorial jurisdiction at the Court of Vadodara and once prima facie case is made out, stay ought to have been granted. As the main matter is pending before the Trial Court, all these points of territorial jurisdiction, contempt and whether there is breach of artistic work of “Bal Hanuman” or not, shall be raised before the Trial Court. As per proviso of Rule 3 of Order XXXIX of the Code of Civil Procedure,1908, in my opinion, at this stage, it is proper to point out that no such satisfaction has been arrived at by the trial court that object of grant of injunction would be defeated by delay. The plaintiff has waited enough from the month of August,2007. The suit was instituted on 24th December,2007 i.e. 4 days prior to the date of release of the film. As the returnable date is fixed by the trial Court on 17th January,2008, the plaintiff may not get chance to argue out the matter before the Trial Court prior to returnable date. Learned counsel for the plaintiff has relied upon the judgement delivered by this Court reported in **1992(2) GLR 1049 and 1998(2) GLR 1776** and pointed out that returnable date may be preponed and immediate hearing may be fixed by this Court. Looking to the aforesaid two decisions, learned counsel for the appellant submitted that they are ready to go on with hearing before the Trial Court immediately and, therefore, defendants are

hereby directed to file their reply to Exh-5 application, if they so choose, on or before, 2nd January,2008 and the hearing of Exh-5 application is fixed on 7th January,2008. Trial Court will decide Exh-5 application on its own merits and on the basis of documents on record and without being influenced by ex-parte interim relief granted by the trial court as well as without being influenced by the order passed by this Court. Rule made absolute with no order as to costs. Civil Application is also disposed of accordingly.

(D.N.PATEL,J)

5. Learned counsel for respondent no.1 (original plaintiff) prayed for stay of the aforesaid order, which is being opposed by learned counsel for original defendants. Looking to the facts and circumstances of the case and the reasons stated hereinabove, stay as prayed for by learned counsel for respondent no.1 is not granted.

(D.N.PATEL,J)

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